**A legal misstep of little consequence? *H v RH (No 2) (Variation of Interim Arrangements)* [2023] EWFC 210**

Macdonald J heard an application to vary interim arrangements in ‘long running financial remedy proceedings’.

**Background**

The litigation history in the case was long and fractious, a final hearing having been listed and re-listed thrice.

The W is 54 and the H is 57. There are two children of the family, girls aged 18 and 16 respectively. This was a marriage of c.28 years. Both parties worked in financial services, the W working for Citibank and then Lehman Brothers; the H worked for Goldman Sachs followed by Deutsche Bank and then Barclays Capital, among other employers. Both parties were unemployed at the time of that hearing but the H was investing in cryptocurrency.

The W petitioned for divorce in January 2020 and decree nisi was pronounced on the 26 November 2020; financial remedy proceedings were initiated in December 2020. The main assets disclosed at the FDA included a business interest valued in the H’s Form E at $75,000; at the pFDR it emerged that this business interest is a vehicle for holding shares in the major cryptocurrency exchange Coinbase, shares that were at that time worth $7m.

The assets in the case total – per the Asset Schedule prepared by the H prior to the June hearing (the judgment comprehensively lays out the law and can be found [here](https://www.bailii.org/ew/cases/EWFC/HCJ/2023/111.html)) which was not agreed by the W – in the region of £13.2M. There were concurrent civil proceedings in the US initiated by the W against the W and a bank in respect of mortgages on two properties the parties hold in Wyoming.

The MPS was for £141,154 per annum including a £7,000 monthly budget to rent in London, with the H to also pay the costs of the W’s move to London, the children's school fees and all reasonable extras, summer tuition and university expenses. The LSPO provided for a payment of £221,554 for costs to the PTR, with a further £151,000, to be paid in two further instalments following the PTR.

Importantly in relation to the W’s MPS application, Macdonald J *‘was satisfied that [the W] intended to return to rented accommodation in central London and that that intention constituted the most obvious material change of circumstances informing the court's evaluation of reasonableness in the context of the application for MPS’*. The W instead moved to one of the two Wyoming properties and her solicitor sought in inter-partes correspondence for the F to cover the related moving costs. Macdonald J notes that the W’s decision prevented that property from providing an income stream.

**The Applications**

There were other interim orders that the parties made applications in respect of and in December 2023, Macdonald J determined eight interim applications dated 23 October 2023 as follows:

1. by the H for the discharge of the freezing order made on 7 September 2023 in respect of his life insurance policy;
2. by the H for an order that he shall borrow against the policy in the sum of $492,501 and the funds be divided equally between the parties in lieu of the MPS payments;
3. by the H for parties to be released from undertakings to not in any way to dispose of, deal with or diminish the value of two bank accounts and be permitted to use the funds therein;
4. by the H for an order that the wife vacate the Wyoming property and for the net rental income from that property and properties held in New York be divided equally between the parties;
5. by the H for discharge of the MPS;
6. by the H for discharge of the LSPO;
7. by the W for the adjournment of the return date for the freezing order; and
8. by the W for enforcement with respect to unpaid MPS and LSPO.

**The Tests**

In respect of the LSPO, the applicable law for varying the same is section 22ZA(5) of the Matrimonial Causes Act 1973 (‘the Act’), pursuant which the court may at any time in the proceedings vary an LSP order if it considers that there has been **a material change of circumstances** since the order was made, **taking into account the factors** at section 22ZB(1)(a) to (h) of the Act.

In respect of the freezing order, *‘the focus should be on whether, on the facts of the case, the evidence before the court demonstrates objectively a real risk of unjustified dissipation which is sufficient in all the circumstances to render it just and convenient to grant a freezing injunction’* [33].

Macdonald J did not cite specific authorities on variation of MPS orders.

At [29], *‘the court will … need to consider the question of whether there has been* ***a change of circumstances*** *since the MPS order was granted and, if so, to apply the principles applicable to the determination of an application for MPS to those changed circumstances, namely* ***"reasonableness"****’*.

Applications to vary or discharge MPS orders are governed by section 31 of the Act, which reads as follows:

*In exercising the powers conferred by this section* ***the court shall have regard to all the circumstances of the case****, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen, and the circumstances of the case shall include* ***any change in any of the matters to which the court was required to have regard when making the order to which the application relates****.*

The *‘reasonableness’* test is explained in *TL v ML & Ors* (‘*TL v ML’*)*[[1]](#footnote-1)* where Nicholas Mostyn KC (as he was then) lays out the law for *making* an MPS award and explains the term that appears as the basis of making an order at section 22 of the Act. This discussion is cited by Macdonald J in the judgment from the June hearing at [42], which is in turn referred to in the December judgment, *‘the law governing orders for maintenance pending suit to meet immediate need is set out in my July judgment’* [29].

In short, *‘reasonableness’* seems not to be the correct test for varying or discharging MPS orders. It is the test for the *making* of an MPS order.

The judge did not lay out the law in respect of the H’s application to be released from an undertaking but, for completeness, it is noted that the relevant law is laid out in *Birch v Birch*[[2]](#footnote-2) and *A v A (Financial Remedies: Variation of Undertaking)*,[[3]](#footnote-3) namely that a **significant change of circumstances** must have occurred in order to open the door to consider this change of circumstances in the light of **all other relevant factors**.

**The Orders Made**

The freezing order was discharged and H was permitted to borrow against the life insurance policy in order to discharge his obligations under the MPS and LSPO as well as meet his own expenses.

The MPS was varied in order to remove the provisions dealing with rent as the provision could not be justified in circumstances where the interim need it was made to address no longer existed.

The parties were released from the undertaking in respect of the bank account and rental income from the Wyoming property not occupied by the W and the New York properties was to be shared equally.

H’s applications for the W to vacate the other Wyoming property and for discharge of the MPS and LSP orders were dismissed.

Reasoning for these orders is given at [36]-[50]. To summarise, in relation to the LSPO, the judge was *‘not satisfied that the circumstances have changed in a way that would justify the court altering the conclusion it reached in June 2023 that, without the provision of funds under an LSPO, the wife would not reasonably be able to obtain appropriate legal services up to and including the final hearing’*.

In relation to discharging the MPS, Macdonald J was *‘satisfied that the circumstances have not changed since June 2023 such that the court could now conclude that the wife can no longer establish a reasonable need for maintenance pending suit, although I am satisfied that there has been a change of circumstances that justifies revisiting the quantum of that order’*. It would be interesting to see whether this reasoning holds up to an application of s.31 of the Act, to include consideration of any changes in the factors that form **all the circumstances to which the court is to have regard** when making an MPS order, as laid out in *TL v ML*.

The final hearing is listed to commence on 19 February 2024.

**Key points**

The crux of the case is in the bar for varying interim arrangements. However, in carrying out a ‘bigger picture’ evaluation of the interim state of affairs and maintaining a focus on the facts, holistic and thorough though this was, the precise tests relevant to the various applications and cross-applications were somewhat lost and the threshold (or thresholds as they perhaps vary for each test) for meeting the criteria to satisfy these at the interim stage is unfortunately no clearer.

1. [2005] EWHC 2860 (Fam). [↑](#footnote-ref-1)
2. [2015] EWCA CIV 833 [15]. [↑](#footnote-ref-2)
3. [2018] EWHC 340 [↑](#footnote-ref-3)